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移民人权问题特别报告员豪尔赫·布斯塔曼特的报告

增编

南非观察团*

内容提要

移民人权问题特别报告员于 2011 年 1 月 24 日至 2 月 1 日对南非进行了正式访问，他访问了比勒陀利亚、约翰内斯堡、穆西纳和开普敦，并会见了政府部长、国会议员、中央和省级政府官员、联合国国家工作队、律师、学者、公民社会组织成员以及在南非的移民。

特别报告员承认该国政府已采取措施保护移民，例如津巴布韦移民正规化进程，并已开始着手解决城镇内发生的针对移民的仇外攻击问题，减轻最近发生的经济危机的影响，尽管如此，特别报告员指出仍有其他尚待解决的挑战。此外，缺乏全面的移民政策及区域和多边协议的情况也阻碍了移民融入社会的进程。

* 本报告内容提要以所有正式语文分发。报告本身载于内容提要的附件内，只以英文分发。

基于这些情况，特别报告员向该国政府提出了若干建议，其中包括有鉴于目前缺乏全面的尊重移民人权并确保其融入南非社会的移民政策情况，有必要编纂完整的数据和统计资料，其依据为劳动力需求、逮捕和拘留外国人的情况、移民获取社会服务尤其是医疗服务的情况、以及举目无亲的外国儿童的处境。

Annex

Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, on his mission to South Africa (24 January - 1 February 2011)

Contents

I. Introduction

1. The Special Rapporteur on the human rights of migrants, Jorge Bustamante, conducted an official visit to South Africa from 24 January to 1 February 2011, at the invitation of the Government. In Pretoria, Johannesburg, Musina and Cape Town, the Special Rapporteur met with Government ministers, Members of Parliament, officials of central and provincial governments, the United Nations country team, lawyers, academics and members of civil society organizations, as well as with migrants. He also visited the Lindela repatriation centre and the Beitbridge border facility, and met with migrant associations.

2. The Special Rapporteur expresses his gratitude to the Government for its cooperation, as well as to the various organizations that provided support for his mission, in particular the Regional Office for Southern Africa of the Office of the United Nations High Commissioner for Human Rights, the International Organization for Migration, the United Nations High Commissioner for Refugees and South African civil society for their support for his mission.

II. General background: the migration phenomenon in South Africa

3. In terms of numbers, internal migration is the most significant form of movement. Since the end of apartheid and the increased integration of the economy with its neighbours, international migration has also posed challenges to Government planning, service provision and social cohesion.[1] Although the scale of migration and its impact vary, Gauteng Province receives the greatest number of migrants from other provinces, while the Eastern Cape loses the most people to other provinces. Despite its impressive dimensions, migration is often less important than other population dynamics. Between 2001 and 2007, for example, while 74 per cent of population growth in Gauteng was due to natural growth (the difference between the birth and death rate of people already living in the province), 26 per cent was due to migration; only 3 per cent of total growth was due to cross-border migration. Cross-border labour migration between South Africa and its neighbours dates back to the mid-nineteenth century, when the South African diamond and gold mining industries were founded and the country began to move towards a modern industrial economy.

4. A significant proportion of citizens from neighbouring States has migrated to South Africa, many to work. Cross-border migration has taken various forms. At one end of the spectrum is the highly regulated and formalized mine contract labour system; at the other, various kinds of informal or unregulated movements across borders. South Africa has received both kinds of migrants for decades. Commercial farmers also relied heavily on outside labour, much of it irregular. The recent crisis in Zimbabwe led to a new wave of movements to South Africa. Migration from Zimbabwe has been around three times greater than that from Mozambique during the civil war. This crisis of migration into South Africa is a direct product of the crisis in Zimbabwe. From 1994 to July 2008, South Africa

[1] Population Movements in and to South Africa, Migration Fact Sheet 1, University of the Witwatersrand, Forced Migration Studies Programme, June 2010.

deported 1.7 million undocumented migrants to neighbouring States, such as Mozambique, Zimbabwe and Lesotho. In 2006 alone, 260,000 migrants were arrested and deported.[2]

5. The lack of reliable statistics regarding international migration, however, allows for rumours and assumptions to take hold. It is estimated that there are approximately between 1.6 and 2 million foreign citizens in South Africa, the majority of them Zimbabweans, including people with valid permits, asylum-seekers and undocumented migrants,[3] or 3 to 4 per cent of the total population - a figure considerably lower than other African countries and countries of destination for migrants. Contrary to popular belief therefore, migration is far less numerically significant.

III. Normative and institutional framework for the protection of the human rights of migrants

A. International legal framework

6. South Africa is party to a number of core international human rights treaties, in particular the International Covenant on Civil and Political Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the International Convention on the Elimination of All Forms of Racial Discrimination, as well as the optional protocols to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities.

7. South Africa is yet to ratify the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the International Convention for the Protection of all Persons from Enforced Disappearance and the Optional Protocol to the Convention against Torture.

8. South Africa has ratified the Convention relating to the Status of Refugees and the protocol thereto, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, and the Migration for Employment Convention (Revised), 1949 (No. 97) and the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) of the International Labour Organization (ILO).

9. Since joining the Organization of African Unity (OAU) in 1994, South Africa has adhered to the OAU Charter and to the African Charter on Human and Peoples' Rights. Finally, the Protocol on the Facilitation of Movement of Persons of the Southern African Development Community (SADC) (to which South Africa is a party) envisages the progressive facilitation of movement in the SADC region through the introduction of free visas and the right of the region's citizens to work and establish themselves freely.

[2] Jonathan Crush, Southern African Migration Project, July 2008. Available from www.migrationinformation.org/USfocus/display.cfm?ID=689.

[3] Office of the United Nations High Commissioner for Refugees, "Flow of asylum-seekers to South Africa grows in 2006", 2 February 2007, available from www.unhcr.org/cgi-bin/texis/vtx/newsitem?id=45c35d1c4.

B. National legal and institutional framework

1. Policy and legislation

10. The constitutional guarantees of human rights and the legal framework governing asylum are widely considered to be progressive.

11. Legislation regulating migration issues includes the Refugees Act (1998), the Immigration Act (2002) (last amended in 2004), the Immigration Regulations (2005), the Criminal Procedure Act (Act No. 51 of 1977), the Defence Act (Act No. 42 of 2002) and the Child Care Act (1983) for minors.

12. The Refugees Act (1998) sets out the procedures for applying for and the granting of refugee status. Condition no. 9 of the asylum-seeker permit allows asylum-seekers to work and study while their applications are pending, although it may take up to six months for an application for political asylum to be processed. This state of affairs raises questions about the welfare of applicants in the interim, and could encourage asylum-seekers to resort to the underground economy or even crime.

13. Immigration issues are governed by the Immigration Act of 2002 ("the Act", last amended in 2004), which regulates the provision to issue permits for skilled migrants, students, tourists and other categories of permanent and temporary migrants by the Department of Home Affairs. It is worth noting that, since 2009, South Africa has entered into bilateral agreements with all neighbouring countries, whereby citizens are eligible for a free visa to enter South Africa for periods of up to 30 days. Such a visa does not include the right to work or to seek employment.

14. The Immigration Act also aims at establishing a system of immigration control, which would ensure that permanent residence permits are issued as expeditiously as possible and on the basis of simplified procedures and reasonable criteria. It also aims at taking into consideration the contribution of foreigners to the South African labour market, which should not have an adverse impact on existing labour standards and the rights and expectations of South African workers. The Act also regulates the arrest and deportation of undocumented migrants.

2. Illegal foreigners and detention

15. According to section 49 of the Immigration Act, it is an offence to enter or remain in the country without a proper permit or papers. Anyone who fails to produce valid documents entitling them to be in the country can be arrested by an immigration officer or a member of the police without a warrant, for purposes of identification (sect. 41). Section 34 of the Act provides for the arrest, detention and deportation of "illegal foreigners". An illegal foreigner is defined under section 1 as "a foreigner who is in the Republic in contravention of this Act." According to the Act, an immigration officer may declare any person an illegal foreigner if that particular officer is not satisfied that he or she is a citizen, a permanent resident or a temporary resident under the Act. Section 32(2) of the Act requires that anyone declared an illegal foreigner be deported.

16. Under the Immigration Regulations (2005), an illegal foreigner may be issued a "Form 20" exempting them from arrest and detention pending the outcome of a status application. A person may be detained on "reasonable grounds" for up to 48 hours while his or her status is investigated. After being declared an illegal foreigner by an immigration officer, he or she may be detained for up to 30 days without a warrant. For detentions lasting longer than 30 days, the immigration officer must obtain a warrant from a magistrate's court. The warrant may extend the detention for a maximum period of 90 days.

17. Following arrest, most illegal foreigners are sent to detention centres, pending deportation. An asylum-seeker whose application is rejected may lodge an appeal within 30 days, but will remain in detention until the appeal is finalized, a process that can take more than a year. Asylum-seekers are only released once they are granted refugee status.[4]

3. Minors

18. Section 28(2) of the Constitution provides that the child's best interests are "of paramount importance in every matter concerning the child". According to section 29(2) of the Refugees Act, "the detention of a child must be used only as a measure of last resort and for the shortest appropriate period of time." The Immigration Regulations stipulate that detained minors should be kept separately from adults and in accommodation appropriate to their age and that unaccompanied minors should not be detained (article 1(d) of annex B to regulation 28(5)). The Child Care Act requires that children be brought before a children's court to determine if they are in need of care.

4. Asylum-seekers and refugees

19. The status of asylum-seekers and refugees is distinct from that of persons deemed illegal foreigners, and is governed separately by the Refugees Act, although the Special Rapporteur did note that this distinction is sometimes subject to confusion and misinterpretation. An asylum-seeker who enters South Africa must present him or herself to one of the country's six refugee reception offices to apply for refugee status. Section 6 of the Act requires that the latter be interpreted and applied with due regard to instruments of international human rights protection. This approach is in conformity with the Constitution, which requires that the Bill of Rights be considered in the light of the State's international obligations. Section 21(4) of the Refugees Act demarcates the boundary between the Immigration Act and the Refugees Act, stating that no proceedings may be instituted or continued against a person for being an "illegal foreigner" if that person has either made an application for asylum or has been recognized as a refugee. Where the Refugees Act applies, the provisions of the Immigration Act should not be employed. The Refugees Act contains its own measures for enforcement, including detention. According to the Refugees Act, a refugee or an asylum-seeker can only be detained if his or her permit has been removed, and even then, he or she must be brought before a high court judge to determine if further detention is reasonable and justifiable.[5] Accordingly, the Immigration Act cannot be applied to individuals whose status falls under the provisions of the Refugees Act.

5. Other arrest procedures

20. The Criminal Procedure Act (Act No. 51 of 1977) allows for the arrest and detention of "prohibited persons", a category of persons different from those deemed "illegal foreigners". In the area of border control, arrest and detention is governed by the Defence Act No. 42 of 2002. While domestic law enables other law enforcement agencies to be involved in immigration enforcement, only immigration officers are empowered under the Immigration Act to declare someone an illegal foreigner and to effect their deportation from the country. In the normal course of events, a police officer, an immigration officer or a member of the National Defense Force patrolling the border may, on reasonable grounds, request a person to identify as a citizen, a permanent resident or a temporary resident. The person may be detained for up to 48 hours while their status is verified, provided that there are reasonable grounds for such detention.

[4] Applications may only be lodged with a designated refugee reception centre. For this reason, applications cannot be lodged at the Lindela facility.

[5] Lawyers for Human Rights, "Monitoring Immigration Detention in South Africa", December 2008.

21. The procedure for extraditing asylum-seekers and refugees is governed by the Extradition Act of 1962, which provides for the arrest of fugitives and subsequent inquiry by a magistrate and, if necessary, an order to surrender by the Minister for Justice and Constitutional Development. If, however, the Department of Home Affairs decides to grant asylum to a fugitive, the Department of Justice and Constitutional Development cannot order the arrest of that person.

IV. Good practices

A. Constitutional and legal guarantees

22. The Special Rapporteur was informed of the strong constitutional and legal guarantees that protect all persons in South Africa against deprivation of liberty and the progressive enumeration of social and economical rights, which prohibits discrimination in access to public services such as health care, education and social security.

23. The Constitution is the supreme law in South Africa. In the preamble, it acknowledges the injustices of the past and dedicates the nation to building a democratic and open society. The Constitution contains 14 chapters and 7 schedules. Chapter 2 (sects. 7-39) contains the Bill of Rights, which is regarded as one the most progressive of the world. Most of its provisions apply to all persons in the country, whether they are citizens or not or have legal status of stay or residence. In particular, section 9, the provision guaranteeing equality of all persons, states that:

(a) Everyone is equal before the law and has the right to equal protection and benefit of the law;

(b) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination may be taken;

(c) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

24. The Special Rapporteur was impressed by the rights protected and guaranteed to all in the Bill of Rights, which he found to be comprehensive and covering all issues relevant to the protection of migrants, in particular the right to freedom and security of the person (sect. 12), the prohibition of slavery, servitude or forced labour (sect. 13), freedom of employment and fair labour practices (sects. 22-23), the right of all to adequate housing (sect. 26), to health care, food, water and social security services (sect. 27) and education (sect. 29), and the protection of children (sect. 28). The State has the obligation to take reasonable legislative and other measures, within available resources, to achieve the progressive realization of each of these rights.

B. Absence of anti-immigrant stance in political discourse

25. The Special Rapporteur noted the absence of anti-immigrant sentiment in political discourse. He welcomes the Government's handling of previous episodes of xenophobic violence, noting in particular that the organization of the FIFA World Cup took place in 2010 without any major incident, as had been feared.

26. The Special Rapporteur was informed of several laws that prohibit discrimination and make it an aggravating circumstance for the purpose of sentencing, such as the Unfair Discrimination Act (2000). He also noted initiatives taken by various authorities, such as the social dialogue on the promotion of tolerance and diversity, an initiative developed by the Department of Home Affairs, and the parliamentary task teams on migration, xenophobia and refugees, formed by the Portfolio Committee of Home Affairs and comprising elected representatives from the National Assembly, which have engaged in the promotion of the economic, justice and human rights of migrants and marginalized communities.

27. The Special Rapporteur was informed that a hate crime bill was currently being prepared by the Department of Justice and Constitutional Development, in charge of drafting bills proposed by the Government. The bill would strengthen the measures already contained in the Constitution and other applicable laws to address violence against foreign nationals (including asylum-seekers and refugees), and would expressly criminalize violence committed against individuals or their property on the basis of a person's race, nationality, religion, ethnicity, sexual orientation or gender identity ("hate crime"). This would follow the introduction in 2009of a law combating human trafficking, currently tabled in Parliament. In the meantime, plans for a potential law against smuggling are still being prepared.

C. Initiative to regularize Zimbabwean nationals

28. The Special Rapporteur was informed of a recent initiative to allow the regularization of Zimbabwean nationals, which had been extended together with a moratorium on repatriations and plans to consider such an initiative to other neighbouring countries. On 3 April 2009, the Department of Home Affairs announced its intention to grant Zimbabweans in South Africa a 12-month "special dispensation permit" on the basis of the Immigration Act, section 31 (2)(b). The permit grants the right to legally live and work in the country. As complementary measures, a moratorium on deportations and a 90-day free visa for Zimbabweans entering South Africa were brought in in May 2009.

29. The Special Rapporteur was able to witness the effects of this initiative first-hand at the Beitbridge border crossing in Musina. The regularization of Zimbabwean migration is consistent with internationally agreed policies on managing migration and has been presented as one of the key goals of the current administration.

30. The Special Rapporteur is of the opinion that the set of policies regularizing movement between South Africa and Zimbabwe is a positive shift towards a more rational, coherent and regionally beneficial approach to migration management. He noted that previous approaches to managing Zimbabwean migration (including the asylum system and widespread arrest and detention) did not address the nature or scale of movement, and thus resulted in high levels of irregular migration, rights abuses and negative consequences for South Africa.

31. The introduction of special temporary permits to manage complex mixed migration is increasingly common internationally. South Africa should receive recognition and support for adopting this policy, given the widespread interest in supporting regional stability and Zimbabwean reconstruction. Regularizing movement between South Africa and Zimbabwe will help to achieve the development goals of the Southern Africa region by facilitating efforts to combat corruption, protect labour standards, improve the economy and fight crime. While the free visa and special dispensation permit is insufficient to achieve these broader policy aims on its own, these challenges would be much more difficult to tackle without the effective implementation of these policies.

32. The Special Rapporteur also noted that the above policies have not led to an increase in the overall volume of migration from Zimbabwe to South Africa. Of the range of legal policy options available to regularize movement between Zimbabwe and South Africa, the proposed special dispensation permit is the most appropriate to the context (the need of Zimbabweans to work and to move freely between countries), besides being the easiest to implement.

33. As the Special Rapporteur was able to see first-hand, many Zimbabweans move frequently between the two countries, often to buy and resell food and goods to support their families remaining in Zimbabwe. Large segments of the Zimbabwean population and economy have been supported for years through remittances from South Africa. Such transfers have been beneficial in supporting the most vulnerable women, children and elderly persons left behind in Zimbabwe.

34. The Special Rapporteur is of the opinion that the special dispensation permits are more likely to facilitate the return of Zimbabweans home than provide an incentive to remain in South Africa, because people can return to Zimbabwe for short periods to assess the stability and economic opportunities of the country without fearing to lose their ability to earn a livelihood in South Africa. There is evidence that migrants who feel threatened through deportation and a lack of legal options for movement are more likely to stay in a foreign country, despite the extreme hardships, since return without alternatives for a known livelihood is too risky. Furthermore, they can gradually invest the money earned in South Africa to re-establish themselves and develop a livelihood in Zimbabwe.

V. Major challenges in the protection of the human rights of migrants

35. Despite the positive measures recently taken at the national level, the Special Rapporteur found that challenges are still to be addressed by the Government, particularly that of effectively protecting the human rights of migrants.

A. Absence of a clear and comprehensive immigration policy

36. Although South Africa is part of the SADC Protocol on the Facilitation of the Movement of Persons, the Special Rapporteur noted the absence of an institutional strategy for this region on migration.

37. South Africa is an attractive destination for Africans from all over the continent, lured by work in mines, farms and homes. Although there are no exact figures available, the Government often cites an estimate of between 4 and 8 million immigrants in the country at any given time. Statistical sources suggest that about 1.5 million of these are Zimbabwean nationals.[6]

38. The Special Rapporteur believes that a clear and comprehensive immigration policy is necessary. Although he was pleased to note that some measures to manage migration flows have been taken, they mostly affect Zimbabwean nationals, who currently represent the largest group of migrants residing in South Africa.

39. The Special Rapporteur did, however, note certain flaws in the above initiative. Permits are issued under the Immigration Act and allow Zimbabwean nationals to apply for

[6] *Regularising Zimbabwean Migration to South Africa,* Migration Policy Brief, Consortium for Refugees and Migrants in South Africa, May 2009.

permits to work, study and or conduct business. However, the deadline for application for these special permits was 31 December 2010. The relatively short period of time that the Zimbabweans were given to apply for this dispensation, combined with additional requirements of a Zimbabwean passport and support for the application from the employer, educational institute or proof of registration of business[7] made it difficult for them to apply in time. The Special Rapporteur regrets that the Zimbabwe Documentation Process has witnessed shortfalls in its application and management, resulting in overly-high demands on Home Affairs offices and in deficiencies in the queuing and application system. The delays in the process and the brief period allocated to it seem to be the greatest obstacles encountered.[8]

40. The Special Rapporteur appreciates the fact that the Department of Home Affairs has attempted to simplify the documentation process, particularly for those who had good reason for not being able to apply by the deadline; he did, however, hear of complaints about the implementation and management processes of this initiative.[9] By the time the shortcomings of the documentation process were discovered, many people had already returned to Zimbabwe to apply for passports, as the few Zimbabwean consulates were often unable to issue the required documentation.

41. These shortcomings highlight the absence of a clear and comprehensive immigration policy applicable to all foreign nationals in the country, covering all categories of migrants. Such a policy would also need to create and maintain the necessary conditions for the successful integration of migrants into South African society.

42. In order to achieve such a comprehensive policy, covering the flow of labour migration and with a human rights-based approach, a regional approach could be developed with SADC member States.

43. The absence of a comprehensive immigration policy with regard to labour demands was also illustrated in 2008 and 2009, during the violent anti-foreigner riots that took place throughout the country. The tensions were fuelled by the economic crisis, which affected the most vulnerable, and the fierce competition for employment between South African nationals and foreigners, who were seen as "stealing" the few jobs available by accepting lower wages and poor working conditions. In other areas, riots were reported in townships where foreign nationals had established small businesses with highly competitive practices, often driving their South African competitors out of business.

44. The Special Rapporteur was informed of the violence that took place in late 2009 in the De Doorns and Worcester communities in the municipality of Breede Valley (Western Cape), where many migrant workers were employed by contractors in the agriculture industry, often at wages and conditions in conflict with labour laws. The Special Rapporteur, who visited the region and met with the municipal authorities, was informed that, at the height of the violence, an estimated 3,000 migrant workers, mostly from Zimbabwe, had to be displaced for their own safety.[10] Although at the time of the visit the situation was again calm, the tension remained and the municipal authorities had difficulties

[7] Submission to the Special Rapporteur on the rights of migrants during his visit to South Africa, January 2011, Lawyers for Human Rights.

[8] African Centre for Migration and Society, press release on the fairness of the Zimbabwe documentation process, 25 January 2011.

[9] Roni Amit, *The Zimbabwean Documentation Process: Lessons Learned*, University of the Witwatersrand, African Centre for Migration & Society, January 2011.

[10] *Violence, Labour and the Displacement of Zimbabweans in De Doorns, Western Cape*, Migration Issue Brief 2, University of the Witwatersrand, Forced Migration Studies Programme, December 2009.

in addressing the needs of these communities, in particular their access to water and sanitation and the delivery of social services, such as health and education.

45. The Special Rapporteur believes that serious incidents that took place throughout the country in 2008 and 2009 demonstrate the need to develop a comprehensive immigration policy at a regional level, and that the absence of such a policy will only exacerbate existing tensions with the different communities, which could escalate into violence once again.

B. Lack of data and statistics

46. The Special Rapporteur expressed concern at the absence of thorough data and statistics concerning not only the migrants present in the country but also the needs of the labour market and demand for the services of migrant workers.

47. The Special Rapporteur noted the difficulties in the collection and analysis of data and statistics relating to migration. On many occasions, existing administrative data and disaggregated statistics were not available or up to date. Data on the entry and exit of foreigners and on residence permits, among other types of information, were difficult to update, although new databases were being integrated into the Department of Home Affairs management system. Beyond the efforts to compile more thorough data on the entry and exit of migrants, a clear distinction should be made between immigration control and crime prevention.

48. The Special Rapporteur noted that other departments, especially those in charge of the labour market and those providing social services, had not collected data systematically and comprehensively, and that statistics on labour demand remained unavailable. The Special Rapporteur was also informed that general population surveys and censuses were conducted at intervals that were too distant and that the questions asked relating to labour and migration issues were not collected during them.

49. The Special Rapporteur believes that only with clear and disaggregated statistics will the South African authorities be able to have a clearer picture of their foreign population and the needs of migrant workers for their economy, and be able to make plans accordingly.

50. The absence of data was particularly relevant when the Special Rapporteur was informed on several occasions that foreign workers, especially Zimbabweans, accept employment for lower wages and longer working hours, in conditions often in contradiction with labour laws, and that labour brokers and contractors tend to give preference to these groups to the detriment of nationals, who are already faced with high unemployment and the effects of the economic crisis. These allegations could not, however, be corroborated by clear and concise evidence owing to the absence of relevant data and statistics. The Special Rapporteur reiterates the need to document labour migration in the different sectors of the economy with data and statistics, so that the real situation can be identified and to ensure compliance with labour laws and standards.

51. The Special Rapporteur encourages measures at the regional level, such as within SADC, in order to measure statistics on the labour demand, which is the driving force behind economic migration, and to better regulate the supply of labour migrants with the needs of the region. This will help to identify current and projected labour supply shortages and surpluses by economic sector, occupation, region and province, and differentiate between labour shortages that are structural from those that are seasonal or otherwise temporary, which is crucial for the design and implementation of effective labour migration policies.

C. Arrest and detention of foreign nationals

52. The constitutional order includes administrative and judicial safeguards on detention. The Special Rapporteur was pleased to see that a new legal framework regarding the arrest and detention of immigrants was introduced after 1994. The new framework includes the Immigration Act of 2002, the Refugee Act of 1998 and, in the areas of border control, detention and arrest, the Defence Act of 2002. The Special Rapporteur noted that, although this legal framework exists de jure, it has yet to be fully implemented by the Department of Home Affairs, which oversees key issues relating to immigration. The Special Rapporteur found that both undocumented and documented foreigners fell outside the existing legal framework.[11] As a result, detention remains the primary tool of immigration enforcement.

53. The Special Rapporteur regrets that shortcomings in the manner in which migrants are treated by the Department of Home Affairs remain. First of all, the Special Rapporteur believes that there are flaws in the Immigration Act with regard to what constitutes an "illegal foreigner". As mentioned above, any immigration officer who has "reasonable grounds" to think that a migrant is in the country in contravention with the Act can detain a migrant. However, the "reasonable grounds" standard is not clearly defined, either in the actual framework or by jurisprudence. As the decision to detain is often left to the immigration officer's own judgement based on what he deems "reasonable grounds", many migrants who are picked up as "illegal foreigners" actually do possess papers entitling them to be in the country legally. A weak legal framework is unfavourable, because it can easily lead to differences in practice, as well as arbitrary and unlawful detentions. The Special Rapporteur would welcome a rewording of the Immigration Act so that it provides clearer standards and policies with regard to what qualifies as an "illegal foreigner" and on which grounds he or she can be detained.

54. The Special Rapporteur also noted certain practices of concern in the enforcement of the Immigration Act, as he was informed of cases where police officers and even members of the military assist with immigration enforcement. Any illegal immigrant arrested by military or police forces must be handed over to an immigration officer; those seeking asylum are transported to a designated refugee reception centre. Immigrants may be detained overnight until the offices of the Department of Home Affairs open (such as in the case of the Musina detention centre situated on the Zimbabwean border). Border control, arrest and detention are also governed by section 18 (1)(d) of the Defence Act, as South African law enables other law enforcement agencies, such as the police or the military, to be involved in immigration enforcement. The Immigration Act is clear, however, on the fact that only immigration officers are empowered to declare someone an "illegal foreigner" and to effect their deportation.

55. The Immigration Act allows "illegal foreigners" to be detained for a period up to a maximum period of 120 days. The Department of Home Affairs has, on numerous occasions, defended both the legality and the necessity of detention beyond this 120-day period. The Act, however, makes no provision for situations in which the detainee cannot be deported within 120 days. The Special Rapporteur was informed that these individuals fall into a legal limbo without governing framework or legal recourse, despite the fact that the Supreme Court of Appeal, in the case *Arse v Minister of Home Affairs and Others*, clearly stated that individuals being detained as illegal foreigners may not be held for more than 120 days (although this case did not apply to requests for asylum received after the individual concerned had already been detained in view of deportation).

[11] Lawyers for Human Rights, "Monitoring Immigration Detention in South Africa" (see footnote 4) .

56. Furthermore, the Special Rapporteur noted inconsistencies in the application of frameworks regarding the right of migrants to apply for an asylum visa. Reportedly, many immigration officers tend to favour the procedures of the Immigration Act that only require a written warrant to extend detention, rather than the more protective procedures of the Refugee Act that only allows detention if the detainee's permit has been revoked (under the Immigration Act). The Department of Home Affairs has defended the necessity to detain asylum-seekers, on various grounds: (a) asylum-seekers who allow their permits to expire become illegal foreigners; (b) when someone ceases to be an asylum-seeker following the initial rejection of his or her claim, regardless of any ongoing appeals; (c) an asylum-seeker permit merely allows an individual to "sojourn" in the country; nothing prevent this sojourn from taking place in detention; and (d) an asylum-seeker permit issued or renewed from detention does not entitle an individual to be released from detention. In the case of *Arse v Minister of Home Affairs and Others*, the Supreme Court of Appeal rejected all of these views and stated that an individual remained an asylum-seeker throughout the appeal and review process, and that the granting of a permit to an "illegal foreigner" rendered that person an asylum-seeker. The Department of Home Affairs therefore cannot detain an asylum-seeker regardless of where that person is in the application or appeal process. This view was later applied by the High Court to the case of *Amadi v Minister of Home Affairs* of 12 January 2010. The Special Rapporteur believes that the Department of Home Affairs should clarify this legal framework, in particular its enforcement and use, and clearly separate between the two different groups of migrants.

57. Apart from the weaknesses in the legal framework, the Special Rapporteur found that the biggest challenge was the absence of monitoring and oversight in existing procedures with regard to immigration, including detention. While the detention of other categories of detainees is supervised by the Judicial Inspectorate for Correctional Services under the control of the Inspecting Judge, persons detained under the Immigration Act do not benefit from such oversight.

58. The Special Rapporteur found the practice of outsourcing the management of the Lindela Immigration Detention Centre to a private corporation unusual. Although at the time of his visit the Centre seemed properly run and managed, concerns could be raised about the accessibility of persons detained and awaiting repatriation to be able to claim asylum or protection under the Refugee Act, especially if contact with Home Affairs officials is limited, given that interactions take place with the private company managing the facility.[12] The Special Rapporteur also heard complaints about the lack of access to health care and to a culturally appropriate diet to detainees, and reminds the Government that, as mentioned in previous reports, detention of irregular migrants should only be used as a last resort, and that migrants should not be treated like criminals.

59. With regard to the Lindela Immigration Detention Centre, the Special Rapporteur recalls that that the Working Group on Arbitrary Detention, in its report on its visit to South Africa in 2005, expressed concern at the situation of foreigners detained under immigration laws, as the procedure did not make it possible to effectively challenge the lawfulness of detention and places the burden on the person concerned to prove the right to remain in the country. Legal aid was not available for immigration matters, and the conditions of detention in the Centre did not meet international standards.[13] Six years later, those concerns remain. The Special Rapporteur would therefore welcome more cooperation with civil society so as to allow monitoring visits to detention centres. Also, he calls upon the

[12] Lawyers for Human Rights, "Monitoring Immigration Detention in South Africa" (see footnote 4).
[13] E/CN.4/2006/7/Add.3, para. 85.

Government of South Africa to end all arbitrary and unlawful detention and to improve the conditions at detention facilities.

D. Access to health care

60. The Special Rapporteur was informed that migrants often find it difficult to have access to adequate health-care services. The difficult material conditions in which migrants are generally forced to live, including overcrowding, poor nutrition, insufficient ventilation, lack of sanitation and little access to clean water, demand that adequate access to health-care services be ensured, especially since such services are guaranteed to all by the Constitution and national laws. As a country of internal and cross-border migration inside a region of high population mobility and a high prevalence of communicable diseases, the Special Rapporteur believes that the Government should develop, implement and monitor a national response to migration and health.

61. Although the Special Rapporteur was pleased to note that the National Health Act and the Constitution guarantee access to life-saving care to everyone, regardless of a person's immigration status, he also noted difficulties regarding the delivery of any health care that went beyond life-saving care. In South Africa, different categories of regional migrants are granted different rights to free public health-care services. According to national legislation, refugees and asylum-seekers should be treated as South African citizens in their access to free public health care,[14] whereas other non-citizens, such as those with work or study permits, usually have to pay a "foreign fee". The Special Rapporteur appreciates the efforts made to provide a legal framework to secure the right to health of migrants; nonetheless, different laws and guidelines seem to have led to confusion with regard to which framework should apply. For this reason, the Special Rapporteur calls upon the Government to take all feasible measures to transform guidelines and protective policies into effective practices.

62. The Special Rapporteur encourages South Africa to take the lead within the South African region, for example within SADC, to finalize, ratify and implement a regional framework for communicable diseases and population mobility. The implementation of the recommendations made in World Health Assembly resolution WHA61.17, on the health of migrants, is also important. In the resolution, the Assembly called upon Member States to, inter alia, promote migrant-sensitive health policies, establish an information system in order to assess and analyse trends in migrants' health, and promote equitable access to health promotion, disease prevention and care for migrants. The Special Rapporteur fully supports the resolution and would welcome the implementation of its recommendations by the Government of South Africa.

63. The Special Rapporteur acknowledges the many difficulties for migrants in their access to health-care services, even though the National Department of Health and its provincial counterparts have issued clear directives to ensure equal access of all to appropriate treatment. He is especially concerned about access to antiretroviral treatment for HIV-positive persons and those with AIDS. Although the national strategic plan for the period 2007-2011 on this issue specifically includes non-citizen groups, they are often met with xenophobic attitudes from health-care staff when they request access to treatment. Some have even reported being denied treatment simply because they were foreigners. In addition to xenophobic attitudes, the Special Rapporteur also noted severe practical challenges. Clinics are often distant from the areas where migrants usually reside. Those in

[14] Jo Vearey, "Migration and health delivery systems in Southern Africa", *Openspace*, vol. 3, No. 3 (October 2010).

detention at correctional facilities or awaiting deportation have complained about not being given the appropriate treatment. Another challenge is that translation is not provided, which sometimes makes it impossible for migrants to receive treatment. The Government should therefore fully implement its national strategic plan and ensure equality and non-discrimination against marginalized groups, such as refugees, asylum-seekers and foreign migrants.

64. The Special Rapporteur heard testimonies in this regard when he visited the Lindela repatriation centre. He therefore urges the Government of South Africa to provide adequate health care and to comply and carry out national policies and guidelines, including for migrants in detention.

65. The Special Rapporteur also heard complaints in relation to access to health care for migrant workers and their families. He was informed that emergency health care in public hospitals is guaranteed for all, regards of a person's legal status. Reports showed, however, that practices differ according to the province, municipality or hospital involved. As mentioned above, full implementation of the right to health care, including national frameworks, policies and guidelines, as well as international instruments to ensure health care for all those in need, regardless of migratory status, is therefore needed.

E. Unaccompanied foreign children

66. The Special Rapporteur was informed about the situation of unaccompanied migrant children. Statistical sources suggest that, in Musina, there are 600 unaccompanied children, and that, in Johannesburg, as at September 2009, at least 150 unaccompanied minors were staying at the Central Methodist church. Many of these minors were boys, and the majority came from neighbouring countries such as Malawi, Mozambique, Swaziland and Zimbabwe.

67. The Special Rapporteur was informed that children migrate to South Africa for various reasons, including the death of parents or a dying parent to care for. The desire to flee from war or lack of access to basic services, or to seek better opportunities for work or education were also common reasons.

68. The Special Rapporteur calls upon the Government of South Africa to investigate into and to provide information on the situation of unaccompanied minors in the country. In his call, he underlines the vital importance of implement existing frameworks and policies regarding minors, as children left to them selves are extremely vulnerable and at a much higher risk of communicable diseases, psychosocial trauma, abuse and exploitation, including exploitative forms of labour and commercial sex work.

69. According to the South African Children's Act (38/2005), unaccompanied minors may very well be "children in need of care and protection"; as such, they are eligible to the same level of protection as South African children. The Special Rapporteur was pleased to note that foreign children were protected under other South African laws as well. However, he regrets that this framework is yet to be fully implemented and urges the Government to strengthen measures and legislation against child labour.

70. The Special Rapporteur found that one of the biggest challenges facing minors was the lack of education. He was informed that some children who migrate to South Africa had not attended school for a long time and therefore had great difficulty in adjusting and attending school. Another reason for not attending school was that children had to work to support themselves or other family members. The Special Rapporteur underlines the obligation undertaken by South Africa to guarantee the right to education for everyone in both national and international instruments. Furthermore, he encourages the Government to

improve the situation of unaccompanied minors residing in the country, and provide them with the rights to which they are entitled.

71. The Special Rapporteur expressed concern about the lack of information on the situation of unaccompanied children. To date, there are no exact figures on, for example, how many minors actually live in the country, where they reside or what their main challenges are. The Special Rapporteur therefore encourages the Government of South Africa to provide accurate data regarding the situation of children as well as on the measures taken to ensure their rights. Another concern relating to the lack of information is the fact that many children enter South Africa without documents, which makes it even more difficult for them to receive adequate help in health care, schooling and living conditions. The Special Rapporteur urges the Government to provide information on how many minors are undocumented and to facilitate providing them with legal documents.

72. The Special Rapporteur reminds the Government of South Africa about the principle of non-deportation of unaccompanied children, underlined on many previous occasions, and about the particularly vulnerable situation of children, who often have nothing to return to in their country of origin. Furthermore, children should be repatriated only if it is in their best interest, namely, for the purpose of family reunification and after due process of law. Finally, the Special Rapporteur recalls that, in previous reports,[15] he called for the need to protect children in the context of migration, and especially migrant children moving across borders, with practical recommendations for consideration and action by States and other stakeholders.

VI. Conclusions and recommendations

73. **The Special Rapporteur thanks the Government of South Africa for its invitation and for facilitating the visit, which allowed him to conduct meetings with all the authorities requested, civil society and the United Nations country team, as well as to conduct interviews with migrants, refugees and asylum-seekers. Despite the efforts made to protect migrants, including by providing assistance to migrants and their families, and recognizing that South Africa has taken measures to protect migrants, such as the process of regularizing Zimbabwean migrants, addressing the xenophobic attacks against migrants in townships and striving to alleviate the impact of the recent economic crisis, the Special Rapporteur noted that a number of challenges still need to be addressed, in particular the absence of a clear and comprehensive immigration policy, the lack of data and statistics, the question of detention of foreign nationals, access to health-care services and the situation of unaccompanied foreign children. In this context, the Special Rapporteur makes the recommendations below.**

74. **With regard to the legislative, institutional and policy framework, the Special Rapporteur recommends that the Government of South Africa ratify:**

(a) The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (as soon as the legal implications of such ratification have been addressed);

(b) The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[15] For example, see A/HRC/11/7.

75. **South Africa should proceed with the adoption and implementation of a comprehensive immigration policy at the national level, guided by international human rights law and standards. Such a policy would encompass:**

(a) The recognition of migrants as part of South African society, providing a vision on how to integrate them into the society and how to guarantee the effective protection of their rights;

(b) The establishment of long-term measures designed to create the conditions necessary for this integration to become a reality;

(c) The promotion of public mass-media campaigns and educational programmes, which would, in particular, focus on positive values that migrants bring to the host society in economic, social and cultural terms. In this context, the Government should give a voice to migrants to express their views and their experience.

The development of such a comprehensive immigration policy at the national level should also encompass a policy framework for social cohesion and the integration of all migrants.

76. **The Special Rapporteur calls upon the Government, in cooperation with relevant international organizations and United Nations agencies, to improve data collection and statistical analysis in relation to aspects of immigration and out-migration. Only with a thorough collection of data and clear statistics about migration in the labour market will the South African authorities be able to have a clearer picture of their foreign population and the needs of migrant workers for their economy, and be able to plan accordingly for them.**

77. **The Special Rapporteur encourages the Government to introduce as soon as possible the hate crime bill, which is currently being finalized by the Department of Justice and Constitutional Development, given the fact that general provisions included in the Constitution and the Criminal Code are not effective enough in protecting migrants from discrimination based on nationality. Migrant communities should be consulted and encouraged to participate in the process of elaboration of this law. The law should, in particular:**

(a) Make any act of violence against individuals or property on the basis of a person's race, nationality, religion, ethnicity, sexual orientation or gender identity ("hate crime") an aggravating circumstance;

(b) Provide effective resources and training for police, justice and other relevant officials to ensure the successful implementation of the provisions of the law, including training on detecting, recording and prosecuting hate crimes, as well as monitoring any trends in them.

78. **In addition to specific legislation, additional measures should be taken, such as:**

(a) Strengthening the response of police and justice authorities to ensure that perpetrators of hate crimes and police profiling of foreign nationals are held accountable;

(b) The development of measures to monitor cases of hate crimes against foreign nationals by using police and justice statistics as a means of monitoring trends of such crimes and the response of police and justice authorities to these cases (with statistics on, inter alia, the number of arrests, the number of offenders prosecuted and the number convicted);

(c) The establishment of a visible and accessible mechanism whereby members of the public can report cases of violence against foreign nationals as a means of providing more effective police responses to mob violence against foreign nationals;

(d) The establishment of a permanent body in the office of the Presidency to ensure effective coordination of different Government department programmes on social cohesion, addressing xenophobia, police profiling and tackling hate crimes.

79. **With regard to the arrest and detention of foreign nationals, the Special Rapporteur recommends that the Government, in particular the Department of Home Affairs, revise the Immigration Act in order to provide clearer standards and policies with regard to what qualifies as an "illegal foreigner" and on which grounds he or she can be detained.**

80. **The Special Rapporteur also reiterates the call made by the Working Group on Arbitrary Detention concerning persons detained under immigration legislation, and urges the Government to take the appropriate measures to allow detained illegal foreigners to challenge their detention and thus exercise all the rights guaranteed by the Constitution.**

81. **The Special Rapporteur recommends in particular that foreigners detained under the Immigration Act in the custody of the Department of Home Affairs also benefit from the oversight of the Judicial Inspectorate for Correctional Services under the control of the Inspecting Judge and have access to the same complaint mechanisms as of detainees serving sentences or awaiting trial.**

82. **The Special Rapporteur commends the Government of South Africa for the regularization exercise for Zimbabweans living in the country (Special Dispensation Permits), which allowed many to apply for a legal residence permit. This measure represents a positive shift towards a rational, coherent and regionally beneficial migration management approach, and should be extended on a regional basis with other SADC Member States.**

83. **The Special Rapporteur encourages the Government to define a clearer appeal procedure and inform rejected applicants of this possibility.**

84. **Regarding access to health services, the Special Rapporteur recommends that the Government carry out and comply with the existing national framework as well as with policies and national guidelines, regardless of a person's legal status in the country.**

85. **In addition, the Special Rapporteur calls upon the Government to implement fully the recommendations made in World Health Assembly resolution WHA61.17, as well as to ensure equal practices and access for everyone to health services and treatment, regardless of a person's legal status or location.**

86. **The Special Rapporteur highlights the importance of an adequate legal framework for the protection of the rights of all children in the context of migration and the need to mainstream a child rights-based approach into migration programmes and policies. He encourages better collection of data at the national level and more thorough research on unaccompanied or separated children. He also recalls general comment No. 6 of the Committee on the Rights of the Child on the treatment of unaccompanied and separated children, in which the Committee provided useful guidance on the protection of the rights of unaccompanied migrant children.**

87. **The Special Rapporteur reminds the Government that migrant children, especially those that are unaccompanied, are most exposed to the worst forms of child labour and, in this context, recalls the relevance of the International Labour Organization Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999 (No. 182) and relevant Recommendation No. 190, and their implementation framework.**

88. **Finally, the Special Rapporteur encourages the Government of South Africa, in its implementation of programmes, to provide unaccompanied migrant children with comprehensive support and protection, including means to identify those who are vulnerable and in need of international protection. Protection services should include access to food, health care and legal advice; support for return to the community of origin; professional and vocational training; and the pursuit of durable solutions in the case of refugee children. These programmes should also include reproductive sexual health awareness and training to address psychological trauma.**